MEMORANDUM TO AN TAOISEACH

Re: Amendment of the Constitution to protect the right to life of the unborn child

CONTENTS

MEMORANDUM TO AN TAOISEACH

Re: Amendment of the Constitution to protect the right to life of the unborn child

Preliminary

1. The first matter which has had to be considered in relation to the proposed amendment of the Constitution is the policy objective concerned. In considering the foregoing I have assumed the aims of the proposed amendment to be as follows:-

(a) To protect the life of the unborn so as to render unconstitutional any future legislation which permitted the procurement of an abortion in circumstances where it is now not lawful without at the same time affecting the existing law on the subject. In particular not to interfere with the existing rights or to render the existing law more restrictive than it is.

(b) That the protection to be afforded to the unborn in the Constitution would be effective from the time of conception. This is a crucial element. The reason for this is the conventional and established view, and certainly the view which is asserted by the group known as the "Pro-Life Amendment Campaign" that the life of the unborn begins at the moment of conception or fertilisation (I am advised there these are synonymous). The reasoning behind this is

that there is no identifiable point in the development of the foetus after the ovum has been fertisised at which it could be said life commences in the foetus. Certainly it is a view that does not go unchallenged elsewhere and I understand that some pro-abortionists argue that life of the foetus does not begin or alternatively that the foetus does not become a person until the embryo has reached the stage where the main organs are distinguishable or alternatively until it has reached the stage where the child could be born, if necessary by operation, with some prospect of survival. It is clear that far from the proposed amendment taking account of such views, which are acted upon in other countries, its purpose is to safe-guard the unborn against the consequences of such an approach.

2. At the earliest stages of pregnancy the fertilisation of the ovum is followed by the implantation of the fertilised ovum in the uterus. A view that life does not begin or at least does not require to be protected until the fertilised ovum is implanted (at the moment of implantation) would permit a form of abortion prior to implantation or more particularly the use of the so called "morning after" pills which prevent implantation, abortifacients which take effect before implantation including I.U.D.'s in so far as these might be considered or come to be considered as abortifacients. (I understand that I.U.D.'s are widely used and indeed

prescribed ~~by and~~ for persons who for other medical reasons cannot take contraceptive pills, that they do have a contraceptive rather than an abortifacient effect but that there is grey area as to whether in fact on occasion they do have such an effect. However I do not put this forward as an authoritative statement because I am simply not in a position to do so).

3. I think I should quote from a statement made by Dr. Julia Vaughan made on the 19th May, 1982 in which she said

> "It bears repeating at this point that there can of course be no argument but that human life exists from the moment of fertilisation. This is an unassailable scientific fact".

Dr. Vaughan may consider it to be an unassailable scientific fact but the fact is that other scientific views are being actively canvassed.

4. While the Constitution is not a place for scientific statements it seems to me that a decision has to be taken as to the stage or point in time at which the protection of the Constitution is extended to the unborn. To decide that the right to life of the unborn as guaranteed in the Constitution should take effect from the moment of conception is not a question of science but rather a political or policy decision. This is a matter which will be referred to again in the context of the wording of the proposed amendment but, as indicated, I have assumed that the proposed amendment should guarantee the right to life of the

unborn from the moment of conception and I have also taken into account the fact that, the policy at least, of the (Health) Family Planning Act, 1979 is against the use of abortifacients, the sale, manufacture etc. of which are expressly declared not to have been authorised by the Act /~although no reference is made to their use_7.

The Existing Law and Practice

Broadly speaking the existing law is governed by section 58 of the Offences Against the Person Act, 1861 which essentially makes it an offence to unlawfully administer any poison or use any other means on any woman with intent to procure her miscarriage.

5. The Pro-Life amendment people state that they are making no attempt to change or strengthen the present law. They state with quite extraordinary confidence that the present law permits operations to save the life of the mother. However it is not at all clear whether they mean all situations where the life of the mother is in either serious or imminent danger and where the appropriate medical treatment was likely or would in fact result in terminating the pregnancy. I refer in this context to the statement of the 19th May, 1982 by the Chairman of the organisatio Dr. Julia Vaughan expressed to be a response to observations made by Reverend Professor Brendan O'Mahoney in a paper on the subject. At page 5 of the statement it is blandly stated that a hysterectomy to save the life of a pregnant woman suffering from cancer of the uterus or the removal of an abnormal fallopian tube

in the case of an ectopic pregnancy, are perfectly permissable under existing law. On the other hand at page 6 of the same statement the question of whether "other life threatening situations" requiring medical procedures which could lead to the destruction of the foetus are protected by existing law is quite frankly dodged.

6. It would greatly simplify matters if one could be as certain as the Pro-Life group are as to the meaning of the existing law. This group has completely ignored the fact that in the 121 years that have elapsed since the enactment of the 1861 Act not one sentence occurs in any Irish reported case concerning its meaning. Indeed in the United Kingdom there is only one case which appears to have considered the application of the section in question (R -v- ~~Byrne~~ BOURNE 1931 1KB 687) and this case is unsatisfactory because it is a mere record of a charge given by a trial judge to a jury who acquitted the accused as a result of which the principles of law set out in the charge were never the subject matter of consideration before an appeal court. In that case the judge told the jury that the abortion was not an offence if it was carried out for the preservation of the life of the mother which he interpreted to include a situation where the probable consequence of the continuance of the pregnancy would be to make the woman a physical or mental wreck. This latter interpretation certainly goes well beyond what the Pro-Life group percieve the law to be in this country. In the end it may be more appropriate

for the Government to consider the meaning of the present law as it is percieved to be rather than any theoretical opinion as to how a court might or might not in the future interpret the statutory provision in question.

7. Having regard to the total absence of judicial pronouncements in Ireland and what I would regard as the unsatisfactory judicial pronouncement in England (for reasons which are not necessary to go into here) I can do no more than express my own personal view concerning how I feel this section would be construed by our courts. I am of the view that the courts in Ireland would regard it as a good defence to a prosecution under the section to show that the operation was performed in the bona fide belief that it was necessary to avert a grave or imminent threat to the life of the mother. It would probably not in my view extend to a defence to a charge of abortion that the operation was performed in order to avert damage to the mental health or even serious damage to the general physical health of the mother. On the other hand however it is impossible to be dogmatic about this. The present statutory prohibition has no specified exceptions and if it permits of an exception where the mother is at risk of losing her life it is difficult to say with certainty that in a "hard case" a court would not hold that an abortion which was considered medically necessary in order to avert serious damage to physical health could not also be excepted e.g. mothers with a heart condition or a mother in a very vulnerable state of mental health. It was

in fact one of these so-called "hard cases" which brought about the extended interpretation of the Act in England.

8. In this context I think it is worth considering (or perhaps raising since I am not in the position of an expert concerning it) current medical practice and what the medical profession here percieve is permissable under the present law. A distinction is usually made between "direct abortion" and "indirect ~~or therapeutic~~ abortion". "Direct abortion" consists essentially of an operation to remove the foetus or the fertilised ovum from the womb and thus terminate pregnancy. "Indirect abortion" is based on the ethic that every person is entitled to appropriate medical treatment for their particular illness or condition and if the appropriate medical treatment puts the foetus at risk or causes the termination of pregnancy it is not considered, by the medical profession as procuring an abortion as referred to in criminal law. It is also maintained that there is no medical condition nowadays in which the simple removal of the foetus or fertilised ovum, a direct abortion, could be considered the appropriate treatment. This view is apparently widely held in the medical profession in this country and abroad and I have had the advantage of reading, confidentially, an advance copy of a paper on therapeutic abortion by two consultants in Holles St. which is about to be published. Briefly, the authors researched the case histories of all expectant mothers who died within 42 days of confinement between the years 1970 and 1979 and who were under the care of the national maternity hospital. There were 74,317 births during the decade and 21 women died. The case histories disclosed that abortion per se (direct abortion) would not

have saved life in any instance.

9. On the other hand medical practice of providing treatment which will or may result in the death of the foetus does extend to cases other than the two cases specified by the Pro-Life Campaign. One example which I have been given is that anti-cancer drugs or radiation for any cancer (even if remote from the uterus) may damage or even kill the unborn baby. Again where an expectant mother has been seriously injured and is on risk of losing her life, as for example after a motor accident, medical procedures might be necessary which would put at risk the unborn baby for the purpose of saving the mother's life. These are percieved by the medical profession to be within the law on the basis that there was no intent to procure an abortion but more an intent to provide the appropriate medical treatment for a life-threatening condition. It used to be argued that a certain condition which amounted to acute vomiting (an acute form of "morning sickness") which could be fatal was a condition which could be treated by terminating the pregnancy, direct abortion. However this is no longer the case since the condition may now be adequately treated by drugs. In short the existing law does appear to be regarded by medical practitioners as permitting "indirect abortion" where the life of the mother is threatened. To what extent there is a grey area where the life of the mother is at risk but not in inevitable or immenent danger I am not in a position to say. Neither am I in a position to speculate as to what extent the medical provession might percieve as lawful, treatment which resulted in the death of the unborn child in order to cure a

condition (or prevent its aggravation) which might result in a loss of life expectancy in 30 or more years time - or indeed whether such problems arise.

10. There is a degree of uncertainty therefore as to the exact meaning of the existing law and further what medical procedures are considered to be in accordance with the present law as percieved by the medical practitioners. This has to be borne in mind when considering the terms of a proposed amendment which is designed not to make the present law (as it is or as it is understood) more restrictive or more liberal. The Minister for Health may be able to assist in clearing up any ambiguities that exist in this area.

11. Nonetheless one basic requirement of any amendment is that it should preserve for the mother the right to be protected against loss of life due to any medical condition arising in the course of her pregnancy.

THE CONSTITUTION

1. In its present form the Constitution guarantees the right to life of living persons in Article 40 which deals with Personal rights and specifically in sub-sections (1) and (2) of section 3 of Article 40 in which the State, inter alia, guarantees to defend and vindicate the personal rights of the citizen and in particular to protect and vindicate the life, person, good name and property rights of every citizen.

2. It is appropriate therefore that the proposed amendment should be incorporated in Article 40 of the Constitution either as an additional sub-section (3) to section 3 of Article 40 or as textual amendments to the existing sub-sections (1) and (2).

3. It is important that any amendment catering for the right to life of the unborn should not be so framed as to reduce the guarantee of the right to life of the living or to exalt the guarantee of the right to life of the unborn above the right to life of the living, in particular that of the mother.

onsideration f possible raft nendments

4. The primary object of the amendment can be simply stated as being to extend to the unborn the right to life as presently guaranteed in the Constitution.

The secondary object of the amendment is to prevent the enactment of any legislation which would permit the procurement of an abortion or as it is sometimes referred to a direct abortion.

5. There are what I would call two approaches by which these objects can be achieved and which I would call the positive approach and the negative approach.

6. The positive approach so called would consist of a general statement of principle asserting the right to life of the unborn.

The negative approach, so called, while acknowledging the general principle would have as its operative clause a provision prohibiting the enactment of legislation permitting the procurement of an abortion.

7. I would favour the positive approach for a variety of reasons but principally because it would be more consistent and more in keeping with the tenor of the Constitution as a social document declaring or confirming the fundamental

rights of persons within the jurisdiction of the State. The right to life generally is recognised as a fundamental personal right both in international law and our own Constitution and it is one which I feel should be asserted positively rather than circumscribed in a negative way. Further it has the obvious attraction of presenting the people with an amendment which asks them to assert the right to life of the unborn rather than to vote against abortion and in this sense it is more likely to be seen by the public as, what the pro-life people have called, a caring and compassionate proposal.

8. The "positive" amendment can, I believe, achieve the desired objects by simply according to the unborn the same guarantee to the right to life as is at present accorded to citizens. As already stated the existing guarantee to the right to life is to be found in the provisions of Article 40.3.1° and 2°. There are several amendments which may be adopted to achieve this end. One of them involves relatively minor amendments to the provisions referred to so as to guarantee the right to life to both the living and the unborn. On the page following this paragraph there is the text of the first of these options. Article 40.3 1° has been amendmed by simply adding the words underlined and Article 40.3 2° has been amended by deleting the existing word "life" (which is the main source of the right to life of the citizen under the Constitution as it stands) and adding the words underlined. The existing text of Article 40. 3 2° is set out at the foot of the page.

DRAFT A

FUNDAMENTAL RIGHTS

Personal Rights

Article 40.

1. ...

2. ...

3. 1° The State guarantees in its laws to respect, and, as far as practicable by its laws to defend and vindicate the personal rights of the citizen and the right to life of the unborn.

2° The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the person, good name and property rights of every citizen and the right to life from the moment of conception.

2° The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name and property rights of every citizen.

9. The advantage of this amendment is that it is relatively simple and does no more than extend the existing guarantees on the right to life to the unborn. As may be seen, the amendment to the second paragraph consists of an all-embracing phrase which, by referring to the right to life from the moment of conception, includes both the living and the unborn.

10. In my view a guarantee of the right to life in the foregoing or similar terms renders it unnecessary to have a clause, as suggested by the Pro-Life group, in which the State would guarantee not to enact any laws providing for the legalisation of any act performed with the intention of procuring a miscarriage.

onflicting ights

11. It is inevitable of course, no matter what formula is finally adopted for the proposed amendment, that the already vociferous critics will strain towards every possible interpretation which could be said to show up deficiencies in its text. It is equally inevitable that questions will be raised as to whether the rights of the mother, in particular the right to life of the mother, is adequately protected or provided for in the event of a conflict arising between her right to life and that of the unborn. In the first instance the right to life of the mother is adequately protected because it has all the same guarantees as the rights of the unborn child.

The question still remains whether legislation can be enacted which would permit for example an abortion in the case of an ectopic pregnancy or other forms of indirect abortion which lead to the death of the foetus or whether the existing legislation which permits it would be deemed unconstitutional. All the fundamental rights guaranteed in the Constitution are guaranteed to all citizens just as the right to life in the proposed amendment is guaranteed to all citizens and the unborn. In the event of a situation arising in which there may appear to be an apparent conflict between two rights it is for the legislature in the first instance and ultimately for the courts to reconcile them. In McMahon -v- the Attorney General (1972 I.R. 69) the question arose, inter alia, as to a conflict between the secrecy of the ballot and the need to permit persons who are disabled, such as blind people, to cast their ballot in the presence of some other person without whose assistance it would not be possible for them to vote. As was stated in that case "the right to vote of the incapacitated person has to be reconciled by the general right to vote by secret ballot. "The latter right, which by its very nature is a guarantee of the free exercise of the right to vote, cannot be made a means of preventing the exercise of the right to vote simply because the incapacity of some electors renders absolute secrecy impossible. A law which contained provisions which enabled

such a person to vote with the maximum degree of secrecy compatible with his incapacity would not only be desirable but would be necessary to implement the right to vote conferred on such person by the Constitution." In short it was a question of the legislature reconciling the apparently conflicting rights so as to enable the rights to be assured as nearly as possible. In my view legislation which permitted operations or other medical procedures to be carried out in order to save the life of the mother would be a reconciliation by the Oireachtas to the apparently conflicting rights of the mother and child in a manner consistent with the provisions of the Constitution.

12. In Ryan -v- the Attorney General (1965 I.R. 294) Kenny J. said in the High Court:-

> "None of the personal rights of the citizen are unlimited: their exercise may be regulated by the Oireachtas when the common good requires this. When dealing with controversial social, economic and medical matters on which it is notorious views change from generation to generation, the Oireachtas has to reconcile the exercise of personal rights with the claims of the common good and its decision on the reconciliation should prevail unless it was oppressive to all or some of the citizens or unless there is no reasonable proportion between the benefit which the legislation

will confer on the citizens or a substantial body of them and the intereference with the personal rights of the citizen".

The State is empowered to legislate for the common good and any legislation which permits medical or therapeutic procedures in respect of an expectant mother in order to remedy or alleviate a real threat to her life but which resulted in the death of the unborn would be consistent with the provisions of the Constitution. On the other hand legislation which permitted abortion because the continuation of a pregnancy to its full term might seriously affect the general health, physical or mental, of the mother would in my view be deemed unconstitutional because it would be considered opressive or disproportionate, there being no reasonable proportion between the benefit which the legislation would confer and the right with which it would interfere. The Constitution is not a place for detailed legislative provisions. This is a matter for the Oireachtas. For example many of the critics of the proposed amendment (for example the Labour Party) assert that there is already a right to life for the unborn in the Constitution and that this has been so declared by the Supreme Court (all of which is incorrect) and that therefore there is no need for a Constitutional amendment. In other words they find the present constitutional and statutory situation

satisfactory and see no conflict between the provisions of the 1861 Act and an acknowledgment in the Constitution of a right to life without any special provision being made in respect of the mother. Again for example the Constitution does not recognise specifically that a citizen is entitled to kill another if this is necessary in self defence against a threat to his own life or serious bodily injury.

13. While I am satisfied that the rights of the mother are not diminished by the proposed amendment I think it is difficult if not impossible to find an objective criteria which can be put into the text of an amendment which would expressly demonstrate this to be so. Therefore a propaganda campaign which was a vociferous and repetitive enough might sow seeds of doubt in peoples minds as to whether the position of the mother was in fact adequately catered for. While it is a matter for political judgment as to whether such propaganda can be countered I would like to think it should not be difficult to do so but it is a sensitive issue in so far as that the point would be made in the context of the so called sectarian issue, namely the supposedly narrow or limited circumstances under which the Catholic Church permits an abortion to take place (although I am not aware that there is in practice nowadays any difference between the teachings of the Catholic Church and the Protestant Churches or the Jewish faith in this regard).

Draft B

14. I think I should refer here to one of the possible amendments produced by the Parliamentary Draftsman for consideration which is in the following terms:

> The State acknowledges the right to life of the unborn. The State, therefore, condemns abortion and, subject to the right to life of other persons, guarantees in its laws to respect and as far as practicable by its laws to defend, the right to life of the unborn.

15. Subject to certain specific reservations this amendment is very much along the same basic lines as Draft A. It gives substantially the same protections which have been referred to in paragraph A but invites debate and perhaps attack because it does not give to the unborn all of the guarantees which are given to the living in respect of their right to life and other rights e.g. to vindicate or protect the life of the unborn from unjust attack.

Condemns abortion"

16. Apart from the general observation just made I think that this particular phrase is inappropriate and unnecessary. The State condemns many things from murder to unofficial strikes but does not say so in the Constitution. The phrase is I think too judgmental in tone and really does not add anything to the right to be protected. In addition the word "abortion" in this context (as opposed to the procuring of an abortion) is ambiguous since the

term is often used in relation to spontaneous abortions where the pregnant mother spontaneously miscarries.

ıbject to
ıe right to
.fe of other
:rsons"

17. I think the use of the two words "other persons" is meaningless when what is obviously meant is the mother and if such a formula were to be used it should be "subject to the right to life of the mother". The Minister for Justice has already made available to me his observations on this particular draft of the amendment to the Constitution which has been extremely helpful. In relation to the words "right to life" reservations arise as to whether this was capable of being interpreted as applying not only to situations where the mother is on risk of losing her life but also to a threat to the quality of her life physically or mentally as indeed the word was interpreted in the English case referred to above. The risk therefore is that by making the right of the unborn subject to the right to life of the mother that one would be 'opening the door' so to speak. I accept the view that the courts would probably interpret this narrowly but I'm not happy with making the right to life of the unborn subject to another right to life namely that of the mother. In interpreting a provision such as the above the courts would first of all seek to determine the meaning of the 'right to life of the mother' and leave over for consideration the meaning of the right to life of the unborn because whatever the latter right may mean it was subject at all

times to the rights of the mother. Therefore in considering whether the right to life of the mother could include a right to a healthy life, physical and mental, it would not be bound to take into account the guarantee of the right to life of the unborn because that would be purely secondary and therefore there would I think be a greater risk that the COURTS would give the broader interpretation rather than the narrower one of the risk of loss of life itself. I think there is some risk that a court might give the broader interpretation particularly when the right to life of the mother is independently mentioned in a further clause notwithstanding that there is a general right to life already guaranteed in the Constitution. Of course if the broader interpretation were given it would bring us on the slippery slope down which many countries have already gone. As against this the pro-life group do accept that operations to literally save the life of the mother are permissable and they can scarcely object to a formula which permits this (unless they are very selective which they may indeed be) so long as it doesn't run the risk of opening the doors.

Pro-Life Proposals

18. I think it would be appropriate here, without intending to burden this Memorandum with too many drafts, TO REFER TO some of those put forward by the Pro-Life people.

The first proposal was sent to my predecessor informally by letter from Mr. Frank Ryan (a member of the campaign) and dated 16th March 1982. It reads as follows:

> "The State guarantees in its laws to respect, and as far as practicable, by its laws to defend the right to life of the unborn and in particular it guarantees not to enact any laws providing for the legalisation of any act performed with the intention of procuring a miscarraige."

19. By letter dated 5th May 1982 the Pro-Life Amendment Campaign produced a different suggestion which reads: -

> "The State recognises the right to life of every unborn child from the moment of fertilisation, and guarantees by its laws to respect and defend such right.
>
> No law shall be enacted to make lawful the performance of any act done with the intention of procuring an abortion."

20. So far as the positive statements contained in each of these two proposals are concerned they are very much the same as the positive statements contained in Draft B and call for the same general comments. The positive guarantees given to the unborn do not coincide with those which are already given in sub-sections (1) and (2) of section 3 of Article 40 in respect to the right to life of the living and other personal rights. I would be

against the negative statement contained in both drafts prohibiting the enactment of laws which permit the procuring of an abortion because I think there is a risk that a guarantee not to enact any such laws might have the effect of threatening the existing right of the mother under existing legislation. The Parliamentary Draftsman has similar fears. If the negative approach, as referred to earlier, were to be adopted I think some clause saving the rights of the mother would be necessary.

Unborn" 21. Doubts were raised by the Minister for Justice as to the use of the term "unborn" on its own without any qualification. It was suggested that a question could arise whether the expression "the unborn" is intended to, and whether it does so in fact, give constitutional protection to: -

(i) a fertilised ovum,

(ii) a fertilised - and - implanted ovum,

(iii) the embryo in the initial period of development before it reaches the stage where the main organs are distinguishable,

(iv) the period between that referred to at (iii) and the time when the child could be born (by operation if necessary) with some prospect of survival. (Paragraph 2 of the Minister's Observations).

This new clause would then become subsection (3) of section 3 of Article 40.

21 C. In addition it will be noted that there is a further sentence which refers to the preservation of the life of the mother. Apart from this important element Draft C is just an alternative way of amending the Constitution in terms of draft A.

/P.T.O...

21A I think the question is validly raised but in view of the fact that the existing law on abortion is understood to be applicable from the time of fertilisation and even in its own context I think the courts would interpret the term "unborn" so as to extend the protection from the moment of conception/ fertilisation. Nonetheless, and unless there are strong reasons against the use of the term, I think the word unborn should be qualified by the ensueing words "from the moment of conception" as set out in draft A. If the term "unborn" were to be used on its own then the proposed amendment would probably have to consist of a separate and new clause as opposed to an amendment of the existing provisions referred to in draft A ~~as~~ since the word 'unborn' on its own would not lend itself to the all-embracing phrase in subsection (2) of that draft.

·aft C. 21B As a drafting alternative in the first instance and also as an alternative method by which the position of the mother might be more expressly catered for I include for consideration on the page following this paragraph a further draft amendment. This draft in the first instance does no more than repeat separately, but independently, the guarantees in the existing draft A. It leaves the existing guarantees to living persons untouched and repeats those guarantees but relates them solely to the right to life of the unborn from the moment of conception. (In this draft the phrase "from the moment of conception" could be left out if desired).

DRAFT C

3° The State -

i. guarantees in its laws to respect, and as far as practicable, by it laws to defend and vindicate the right to life of the unborn from the moment of conception, and

ii. shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate that right.

This shall not be held to mean that the State shall not, in its enactments, have due regard to the preservation of the life of the mother.

22. The main body of draft C. at paragraph (i) and (ii) does not call for any further comment repeating as it does in a different form what is comprehended in draft A.

The final sentence however is one which will require consideration. It is not dissimilar to the manner in which Article 40.1 is drafted which is as follows:

> 1. All citizens shall, as human persons, be held equal before the law.
>
> This shall not be held to mean that the State shall not, in its enactments, have due regard to differences of capacity, physical and moral, and of social function.

23. The additional sentence which I shall refer to as the proviso, simply provides that the State may, when passing legislation, have due regard to the preservation of the life of the mother and that is not precluded from doing so by the preceeding guarantees. It is highly questionable whether such a proviso is necessary at all. Since the right to life of the mother is already guaranteed in the Constitution the State is bound, where it is appropriate in its enactments, to have due regard to that right. However it may be considered to be politically more attractive to have such an express provision to reassure those who may have seeds of doubt sown in their minds by those who propagate the so-called sectarian tag.

24. In principle, I do not see any harm in having a proviso of this nature, particularly when there is a precedent OF SORTS for it and there are two other instances in the Constitution, in a different context, where the State is required "to have due regard" to certain other rights. The main difficulty lies in finding an appropriate wording that doesn't make the present situation more restrictive or run the risk of opening the door. The phrase "preservation of the life of the mother" was interpreted in the English decision, unsatisfactory as it may be, as entitling an abortion to be carried out in order to safe-guard the general health of the mother and this would certainly not be in accordance with the objectives of the proposed amendment. On the otherhand, this particular proviso does not make the right to life of the unborn subject to the life of the mother. It merely recites what the State may have regard to in its enactments and falls to be interpreted in the light of these specific guarantees in the body of the clause itself. Other formulae for this proviso have been considered both by myself and the Parliamentary Draftsman and we haven't come up with any more preferable ones. It may be argued by the Pro-Life people that it does qualify the guarantee in some respect with the risk therefore as being interpreted as opening the door to abortions in other than life-threatening situations. It is certainly a

proviso which will require careful consideration because I think it is one that once made public would be difficult to withdraw without then being open to the accusation that the position of the mother is not being adequately catered for. On the other hand it could be kept as a possible amendment to any published drafts should it be deemed necessary to allay any fears that might arise in this context. ~~On the other hand~~ In view of the fact that both ourselves and the opposition have already had discussions with the Pro-Life people it might be considered whether a further discussion on this aspect of the draft, in advance of a final decision, would be worthwhile.

raft D.

Draft D is the proposal which would take the negative approach already referred to. It is not one which I would favour but I include it for consideration. The possible text would read as follows:

1. The State acknowledges the right to life of the unborn from the moment of conception.

2. No law shall be enacted permitting the procurement of a miscarriage save where it is necessary to save the life of the mother.

25. The kind of provision envisaged in subsection (2) above is not dissimilar to that used in the Constitution in relation to divorce which provides that "no law shall be enacted providing for the grant of a dissolution of marriage".

26. As already indicated earlier in the Memorandum a bare prohibition on the enactment on such laws runs the risk of restricting the present legal situation and this is why a saving on the lines indicated would have to be considered in conjunction with such a proposal. On the other hand there is a certain inconsistency because subsection (2) implies that the procurement of a miscarriage may be necessary in order to save the life of the mother whereas there is a considerable body of medical opinion, both in this country and elsewhere, that maintains that this does not arise. What does arise they say is that an expectant mother may require appropriate medical treatment which results in the loss of the foetus but that such treatment never consists simply of procuring a miscarriage or an abortion or in other words is not the so-called direct abortion or miscarriage.

27. Again one has the problem of making the indirect protection to the unborn subject to a saving in favour of the life of the mother with all the interpretative difficulties that this word gives rise to, particularly in such a context.